United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1349

To be argued by
PATRICIA ANNE WILLIAMS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1349

UNITED STATES OF AMERICA,
Appellee,

—v.—

HENRY BENTON, a/k/a "ROGELIO BERRIOS,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

PATRICIA ANNE WILLIAMS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

UNITED STATES COURT OF APPEALS
FILED
NOV 17 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 2

The Government's Case 2

1. Summary 2

2. The theft of the Ivy Brown and Noel Watkes checks 3

3. Marjorie Benton Opens the Fictitious Bank Account, and, together with Henry Benton, Withdraws the Proceeds 3

4. The Arrest of Henry Benton 5

The Defense Case 7

The District Court's Verdict and Findings of Fact 7

ARGUMENT:

The Evidence Was Sufficient To Estab'ish Benton's Guilt as an Aider and Abettor 9

CONCLUSION 17

TABLE OF CASES

Glasser v. *United States*, 315 U.S. 60 (1942) 9

Grunewald v. *United States*, 353 U.S. 391 (1957) .. 16

Krulewitch v. *United States*, 336 U.S. 440 (1949) .. 16

Nye & Nissen v. *United States*, 336 U.S. 613 (1949) 10, 15

PAGE

Roberts v. *United States*, 416 F.2d 1216 (5th Cir. 1969) 16

United States v. *Bowles*, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970) 14

United States v. *Cades*, 495 F.2d 1166 (3rd Cir. 1974) 14

United States v. *DeAlesandro*, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966) 14

United States v. *DiStefano*, 555 F.2d 1094 (2d Cir. 1977) 14

United States v. *Falcone*, 544 F.2d 607 (2d Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3600 (March 7, 1977) 9

United States v. *Ferraro*, 414 F.2d 802 (5th Cir. 1969) 16

United States v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, — U.S. — (1976) 15

United States v. *Gard*, 344 F.2d 120 (2d Cir. 1965) 10

United States v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962) 13

United States v. *Hawley*, 554 F.2d 50 (2d Cir. 1977) 9

United States v. *Hyatt*, Dkt. No. 77-1294, slip op. 177 (2d Cir. November 1, 1977) 15

United States v. *Johnson*, 513 F.2d 819 (2d Cir. 1975) 14

United States v. *Lefkowitz*, 284 F.2d 310 (2d Cir. 1960) 13

United States v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) 13

United States v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) 14

PAGE

United States v. *Peoni*, 100 F.2d 401 (2d Cir. 1938) 10

United States v. *Pinkerton*, 151 F.2d 499 (5th Cir. 1945), *aff'd*, 328 U.S. 640, *reh. denied*, 329 U.S. 818 (1946) 14-15

United States v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975) 9-10

United States v. *Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*) 12

United States v. *Tutino*, 269 F.2d 488 (2d Cir. 1959) 10

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1349

UNITED STATES OF AMERICA,

Appellee,

—against—

HENRY BENTON, a/k/a "Rogelio Berrios,"

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Henry Benton, a/k/a "Rogelio Berrios", appeals from a judgment of conviction entered on July 21, 1977, in the United States District Court for the Southern District of New York after a two-day bench trial before the Honorable Robert J. Ward, United States District Judge.

Indictment 77 Cr. 435, filed on June 9, 1977, charged Benton in five counts with aiding and abetting Marjorie Benton, a/k/a "Linda Perez," in uttering forged United States Treasury checks (Counts One through Five), in violation of Title 18, United States Code, Sections 495 and 2, and one count of aiding and abetting Marjorie Benton in the possession of stolen mail (Count Thirteen), in violation of Title 18, United States Code, Sections 1708 and 2.*

* The same indictment charged Marjorie Benton with a total of 12 Counts of uttering forged United States Treasury checks and 10 Counts of possessing stolen mail.

Trial as to Henry Benton commenced on June 30, 1977 and concluded on July 1, 1977, when Judge Ward found Benton guilty as charged on Counts One and Two, and not guilty on Counts Three, Four, Five and Thirteen.*

On July 21, 1977, Judge Ward sentenced Henry Benton to a two-year term of imprisonment on Count One, and a five-year term of probation on Count Two, with the term of probation to commence upon expiration of the term of imprisonment.

Benton remains at liberty on a $2,000 Personal Recognizance Bond pending this appeal.

Statement of Facts

The Government's Case

1. Summary

The Government's evidence established a check-stealing-and-cashing scheme engaged in by Henry Benton and his sister, Marjorie Benton. Henry or Marjorie obtained stolen U.S. Treasury checks and thereafter converted the proceeds of these checks through a bank account set up under a fictitious name by Marjorie Benton. While Marjorie Benton was the prime mover throughout this scheme, the proof demonstrated that she relied upon the aid and assistance of her brother, Henry Benton.

---

*On June 21, 1977 Marjorie Benton pleaded guilty to 6 Counts of this indictment, including Counts One and Two. She was sentenced by Judge Ward on August 4, 1977, to a term of 4 years imprisonment on each count, to run concurrently.

2. The theft of the Ivy Brown and Noel Watkes checks

On April 1, 1977 the mailbox of Ivy Brown was broken into at 830 Stebbins Avenue, Bronx, New York, and her disability insurance check in the amount of $239.30 for the month of April 1, 1977, was stolen. (Tr. 6-7, 9).* Although this same check later was negotiated, Ms. Brown testified that she had not received the check, nor endorsed it, or authorized anyone to cash it. (Tr. 7; GX 2).

On April 4, 1977, the mailbox of Noel G. Watkes, was broken into at 840 Stebbins Avenue, Bronx, New York, with the resultant theft of Watkes' April, 1977 social security check in the amount of $349.90. (GX 3).**

3. Marjorie Benton Opens the Fictitious Bank Account, and, together with Henry Benton, Withdraws the Proceeds

The same day Mr. Watkes' mailbox was broken into, a checking account was opened by Marjorie Benton in the name of "Linda Perez" at Branch 49 of the Chemical Bank in the Bronx, New York (Tr. 29, 33-34; GX 8).*** Within the next 3 days a total of $1,440.42, all in checks

---

* Citations to "Tr." and "GX" refer to pages of the trial transcript and to Government Exhibits, respectively.

** Mr. Watkes testified that he received his mail, including his monthly Social Security check, at 840 Stebbins Avenue although it was addressed to his prior residence at 24 East 116th Street New York, New York. (Tr. 14-16).

*** The application card which Marjorie Benton filled out listed Linda Perez' telephone number as 589-8548; her address as 2042 Webster Avenue, Bronx, New York, a building which she stated she owned and where she had lived for 10 years; and that she also owned a business called Perez Plastics, at the same address, which she had operated for six years. (GX 8).

except an initial cash deposit of $60.00, was deposited into that account. Among the deposits were the Brown and Watkes checks which, when deposited, had a second endorsement in the name of "Linda Perez". (GX 9, 9A).

In the early afternoon of Friday, April 8, 1977, Marjorie Benton entered the bank and requested some blank bank checks from George Leitenis, a Service Specialist at Chemical. (Tr. 29, 32). Marjorie Benton identified herself to Leitenis as "Linda Perez," and Leitenis requested her to sign the same name.* Marjorie complied, signing the name "Linda Perez," and Leitenis immediately verified her signature against the signature card signed and filed when the account was opened. (Tr. 45-46). Thereafter, Mr. Leitenis gave her two blank counter checks. (Tr. 32-34, 41; GX 10, 11). Marjorie Benton immediately presented one of the counter checks, made out in the name of Linda Perez, for the amount of $1,200, to a teller for cashing.** After the check was cashed, the only remaining funds in the account related to deposits which had not yet cleared and therefore could not be withdrawn. (Tr. 48, 49; GX 10).

No sooner had Marjorie Benton left the bank, than Henry Benton entered 10 to 15 minutes later, approached Mr. Leitenis, and presented the second counter check for approval, filled out in the amount of $220.00 and signed

---

* Mr. Leitenis, who testified as a witness called by the Government at trial, identified a photograph of Marjorie Benton as the woman he knew as Linda Perez. (Tr. 42-43, 87-89). After certified birth certificates were offered to show that Marjorie Benton, a/k/a "Linda Perez," and Henry Benton were brother and sister, defendant conceded the issue. (Tr. 89-90; GX 15, 16).

** Mr. Leitenis testified that the teller, Marianne Borero, asked him whether the check was his and could be cashed. Leitenis checked the account to determine the amount of collected deposits, initialed the check on its face to indicate approval, and instructed the teller to cash it. (Tr. 46-51).

by "Linda S. Perez." (Tr. 35; GX 11). Leitenis inquired of Benton as to the purpose for which the check had been given to him. Benton's reply was that he had done "some boiler work for Mrs. Perez." (Tr. 35). Mr. Leitenis then advised Benton that the funds were not as yet collectable and that he should return at a later date. (Tr. 35-36).

4. The Arrest of Henry Benton

On Tuesday, April 12, 1977, Henry Benton telephoned Mr. Leitenis and inquired whether the $220 check now could be cashed. Mr. Leitenis said no, and, in the course of the conversation, asked Benton if he knew where Mrs. Perez could be reached. Leitenis read the telephone number provided on the "Linda Perez" application to Benton. Benton told him that he had the wrong number and provided the correct one by changing the last digit. (Tr. 37, 63-69).

On the following day, April 13, 1977, Benton visited the Chemical Bank again, after inquiring of Leitenis whether the check could be cashed. (Tr. 39-40, 63, 114, 118). Benton went directly to Mr. Leitenis and gave him the $220 check. Leitenis then handed the check to Special Investigator Frank Gonzalez and Postal Inspector Juan Albornoz, who, having been notified by Leitenis of the suspicious development, were waiting in the rear of the bank. (Tr. 40-41; GX 11).

Special Investigator Gonzalez identified himself to Benton, advised him that the Postal Service was investigating the account of Linda S. Perez and asked Benton for his own identification. Benton produced a New York City Department of Social Services photographic identification card * and told Gonzalez that the $220 check

* A duplicate of that card, maintained by the New York City Department of Social Services, was introduced in evidence. (GX 19).

had been given to him in payment for repairs which he had made in Ms. Perez' home. (Tr. 67). Benton stated that he knew where Linda S. Perez lived and would take the Postal authorities to her. (*Id.*) Before leaving the bank Postal Inspector Albornoz asked Benton if they could inspect the contents of the vinyl briefcase he was carrying. Benton agreed. Inside the bag the agents found, *inter alia*, a 15-16 inch crowbar. (Tr. 68, 96). Special Investigator Gonzalez took possession of the bag, with Benton's permission, and the three men got into the Postal Service car.

Thereafter, Benton was asked further questions and his responses quickly became irreconcilably inconsistent. Once inside the car, Benton was asked where they should go to locate Linda S. Perez and he replied that he didn't know. (Tr. 68, 97). On further inquiry Benton said he didn't know Ms. Perez' phone number, that he didn't know how to get in touch with her but just "saw her around." (Tr. 68). Later on, at the Bronx General Post Office, Benton not only denied any knowledge of a Linda S. Perez living at 2042 Webster Avenue but also denied that there was any relationship between them. (Tr. 101-102). However, Benton did admit that he lived at 2042 Webster Avenue.* (*Id.*).

At the General Post Office, Benton was placed under arrest. (Tr. 74-76, 107). A routine search of his personal belongings revealed a business card from John Webster's Rug Cleaning, Ltd. (Tr. 77-78, 107-108; GX 13). On the reverse side of the card, on the left hand side, appeared the numbers 1 through 10. Next to number 1

---

* The same day, April 13, 1977 Investigator Gonzales visited 2042 Webster Avenue, a wood-frame, two-family house. (Tr. 81). On the front door of that building was a strip of masking tape with the names, "Sparks, Berrios, Benton, and Perez." (Tr. 101-02).

was written the notation "349.00, 4/1/77;" next to number 2 was written "239.00, 4/4/77." (GX 13). These dates and amounts corresponded to the stolen Ivy Brown and Noel Watkes checks.*

The following morning, after again being advised of his constitutional rights, Benton was interviewed by an Assistant United States Attorney. During this interview Benton denied that he had any relatives in New York City other than his mother, his son and a few aunts. (Tr. 86; GX 14). In addition, Benton gave several other false statements. Thus, Benton also stated that he was "managing the house" at 2042 Webster Avenue which was owned by a woman named Lillian Long, that he had known Linda Perez for about a week, and that she was "supposed to be in plastics." Benton further claimed that the first time he met Linda Perez she was looking for a room to rent and that the second and last time he saw her was to obtain the check for the rent.**

The Defense Case

Benton presented no evidence.

The District Court's Verdict and Findings of Fact

Following complete arguments by defense counsel and the Government, Judge Ward stated on the record his findings of fact and the verdicts.***

---

* The remaining numbers on the card had nothing next to them. The card also bears the name "Perez" and the number 589-8547. Benton did not answer questions put to him about this card. (Tr. 108).

** Benton admitted that he had intended to keep this supposed rent check for himself and later told the Postal Inspectors that "Linda Perez" had forged his landlady's signature on a lease for the room. (Tr. 123-124).

*** The trial judge's findings are set forth in full at "D" of defendant's appendix and Tr. 170-76.

First, the trial judge found as to each count under consideration that the Government had proved beyond a reasonable doubt that:

(a) the respective checks were genuine obligations of the United States;

(b) the endorsements on the backs of the checks were forgeries; and,

(c) Marjorie Benton altered the checks intending to defraud the United States.

Second, Judge Ward determined from all of the direct and circumstantial evidence—particularly defendant's false statements to the Postal Inspectors and the Assistant United States Attorney, the business card found on Benton's person at the time of his arrest with the notation of the stolen checks on the back, and Benton's own conduct at the bank—that Henry Benton had knowledge of the thefts and actively participated in the crimes charged.

Finally, the District Court found from the circumstances of the theft of the Ivy Brown and Noel Watkes checks, defendant's possession of a crowbar, and the business card, as well as all of the other circumstantial evidence, that Henry Benton had stolen the Brown and Watkes checks and turned them over to his sister, Marjorie Benton. Judge Ward concluded:

> "To summarize, the court finds that the defendant knew that the checks in counts 1 and 2 were U.S. Treasury checks and that he stole them from the mail boxes of Ivy Brown and Noel G. Watkes on April 1, 1977 and April 4, 1977 respectively, and turned them over to Marjorie Benton, also known as Linda Perez, to cash. The court finds that these checks are included within the sum of $1200 which was thereafter obtained by Marjorie Benton.

The court finds the defendant to have aided and abetted Marjorie Benton in the commission of the crimes charged in counts 1 and 2, and finds the defendant guilty on counts 1 and 2." *

ARGUMENT

The Evidence Was Sufficient To Establish Benton's Guilt as an Aider and Abettor.

On this appeal Benton contends that the evidence was insufficient to support Judge Ward's verdicts of guilty on the two counts of which defendant was convicted as an aider and abettor. While Benton does not seriously dispute that the evidence plainly showed him to have been involved with his sister's scheme to obtain the proceeds of stolen and forged U.S. Treasury checks, he maintains that the District Court's findings that defendant participated as an aider and abettor before the completion of the underlying crimes, were clearly erroneous. Defendant advances this argument only by reviewing pieces of evidence in isolation and removing them from the context of the Government's overall proof adduced at trial. This misguided effort not only violates the cardinal principal that a claim of insufficiency must be evaluated by viewing the evidence in the light most favorable to the Government,** but also

---

* The trial judge also concluded that the Government had failed to prove beyond a reasonable doubt that Benton aided and abetted commission of the remaining crimes charged in counts three through five and thirteen, prior to the dates on which those crimes were completed Accordingly, Benton was acquitted of those charges.

**See e.g., Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Hawley*, 554 F.2d 50 (2d Cir. 1977); *United States* v. *Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, — U.S. —, 45 U.S.L.W. 3600 (March 7, 1977); *United States* v. *Rivera*,

[Footnote continued on following page]

ignores the right of the trier of fact—here the District Court—to draw reasonable inferences from the evidence. Under a proper view of the record, it is clear that the evidence was more than sufficient to support the trial court's verdict and that Judge Ward's findings were fully warranted and correct.

The trial court specifically found that Benton, with full knowledge of the illegal scheme, aided and abetted his sister in the uttering of forged treasury obligations, by stealing the United States Treasury checks issued to Ivy Brown and Noel G. Watkes and thereafter giving them to Marjorie Benton for deposit into the fictitious Linda Perez bank account. Judge Ward further found that Benton recorded the amounts of the checks and the dates of the thefts on the business card later found in his possession, and that these checks were included in the $1,200 which Marjorie Benton obtained from the bank on April 8, 1977. (Tr. 174-75). These findings plainly justified the conclusion that Henry Benton "associate[d] himself with the venture, that he participate[d] in it as something he wishe[d] to bring about, that he [sought] by his action to make it succeed," *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), and were amply supported by the record.

The Government established through the testimony of Brown and Watkes that their checks were stolen from their mail boxes on April 1 and April 4, 1977, respectively, and that these two Treasury checks immediately thereafter were deposited into the newly opened Linda

---

513 F.2d 519, 529 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975). This standard of review is not altered by the fact that the case was tried to a Judge rather than to a jury. *United States* v. *Tutino*, 269 F.2d 488 (2d Cir. 1959). Moreover, as to any facts which may have been in dispute during the trial, Judge Ward's determination cannot be upset on appeal except under extraordinary circumstances. *United States* v. *Gard*, 344 F.2d 120 (2d Cir. 1965).

Perez account on April 5, 1977. Thereafter, following Marjorie Benton's withdrawal of most of the funds in the Perez account on April 8, 1977, Henry Benton appeared at the same bank and sought to negotiate another bank check drawn on the Perez account, given to him by his sister Marjorie. At that time, Henry Benton falsely advised Leitenis, the bank officer, that Linda Perez was a woman for whom he had performed some boiler work and who had paid him by the proffered check.*

Following Benton's return to the bank on April 13, 1977—again to attempt to cash the Perez bank check—and his several false statements to the Postal Inspectors, he was found to have in his possession a business card with two notations exactly corresponding to the dates and amounts of the stolen Brown and Watkes checks, as well as a crowbar.

In the circumstances of Benton's earlier suspicious and deceptive behavior at the bank, as well as his unexplained possession of the highly incriminating business card and the crowbar, Judge Ward properly found the compelling inference that Benton had stolen the two checks in question and turned them over to his sister. Indeed, this conclusion was not only warranted, but inescapable. Benton's dealings at the Chemical Bank—given his false statements about Linda Perez, and the proximity of his attempt to cash the check with his sister's earlier efforts—showed beyond any possible question that he had full knowledge of and was a participant in the scheme to forge and utter stolen checks. The significance of the finding of the crow-

---

* Benton, of course, dramatically changed this story six days later when he gave a different—although equally false—explanation of the check to an Assistant United States Attorney. Benton stated that the $220 check was money he received from "Linda Perez" for the rental of an apartment at 2042 Webster Avenue, a building owned by someone else whose signature "Linda Perez" had forged on a lease. (GX 14, at p. 4).

bar was made apparent from the facts that Benton was unemployed,* that his visit to the bank on April 13th was unscheduled, and that the Brown and Watkes checks had been stolen by the breaking open of their mailboxes in a manner consistent with the use of a crowbar. Thus, on the day of his arrest Benton was found to have in his possession the very instrumentality that give him the means and opportunity to commit the check thefts in the course of what was then an ongoing scheme. See *United States* v. *Robinson*, 560 F.2d 507, 513 (2d Cir. 1977) (*en banc*), and cases cited therein.** Finally, the business card in his possession, which contained the specific notations of the two stolen checks, obviously tied Benton's possession of the crowbar to the specific thefts in issue and further established that Benton had to have seen those two checks

---

* The testimony of Special Investigator Albornoz, the statements of Benton himself and the testimony of William Fisher, an employee of the New York City Human Resources Administration, established that Benton was unemployed. In fact, the evidence showed that Benton was receiving both welfare and unemployment benefits under different names. (Tr. 103, 128-29; GX 19, 20).

** Defendant's reliance on *Robinson* is misplaced since that decision clearly supports Judge Ward's findings in this case. In *Robinson*, this Court, *en banc*, recognized that defendant's subsequent possession of a gun of the same caliber used in the bank robbery at issue was probative of Robinson's "'opportunity' to commit the bank robbery, since he had access to an instrument similar to that used to commit it." 560 F.2d at 513. The same of course can be said of the crowbar found in Benton's possession in this case. Defendant argues that unlike *Robinson*, there was no other evidence that linked Benton to the actual thefts. This contention, however, ignores the facts that Benton's business card directly tied him to the thefts, as did his attempt to obtain the proceeds of these checks from the bank. Moreover, here defendant's possession of the instrumentality used to commit the thefts was only 12 days after the checks disappeared, thus strengthening the inference that this Court expressly approved in *Robinson* where the gun was found *10 weeks* after the commission of the crime.

prior to the time they were deposited * with a group of other checks into the Perez account.**

In making his findings, Judge Ward also was entitled to consider as persuasive and supporting the inference of Benton's participation in the crimes charged, the fact of defendant's several post-arrest false exculpatory statements. The trial judge was entitled to conclude that the obvious thrust of these statements was not merely to conceal the identity of defendant's sister, Marjorie Benton, but to disguise the fact of Henry Benton's own awareness and participation in the scheme to utter the forged checks.*** As such, these false exculpatory statements

---

* Indeed, the notation of the two checks on the business card, by itself, was a sufficient act to make Benton an aider and abettor. The recording of the stolen checks helped Benton determine his share of the venture and further provided a means to verify the amounts deposited into the Perez account and the availability of those funds for withdrawal.

** Benton takes issue with the clear logic of the proper inferences from these facts and argues that the trial court's conclusions were merely "speculation and conjecture." (Br. 12). Defendant's argument, however, ignores the essential point that willful participation in a criminal enterprise may be established by evidence which is completely circumstantial. See *e.g., United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Lefkowitz*, 284 F.2d 310 (2d Cir. 1960). See also *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962). Here, the proof that Benton had stolen the two checks, while circumstantial, nevertheless was convincing.

*** Defendant's claim that these false statements solely were designed to protect his sister, is refuted by the fact that even before the scheme had been detected Henry Benton made similar statements to Leitenis at a time when they were clearly designed to further the scheme in progress—*i.e.*, to obtain the proceeds of the stolen checks—as Judge Ward specifically found. (Tr. 173, 176). Moreover, the evidence showed that Benton and his sister collaborated on the underlying story which was intended to substantiate the identity of Marjorie Benton as "Linda Perez." Thus,

[Footnote continued on following page]

constituted circumstantial evidence of consciousness of guilt and had independent probative force. *United States* v. *DiStefano*, 555 F.2d 1094, 1104 (2d Cir. 1977); *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975); *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States* v. *DeAlessandro*, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966).

In sum, the record viewed in its entirety amply supported Judge Ward's finding that Benton had stolen the two checks in question and turned them over to his sister for negotiation.

In any event, Benton's vigorous attack on the trial court's finding that he stole the checks does not support defendant's contention that this finding, if unwarranted, requires reversal of his conviction. Even without reference to his conclusion that Benton had stolen the checks, Judge Ward specifically found from all of the evidence that Benton had knowledge of and was an "active participa[nt] in the crimes charged." (Tr. 174). Thus, the trial court's findings clearly supported the conclusion that Benton was a member of a conspiracy or joint venture with his sister to cash stolen and forged treasury checks, and that in furtherance of this scheme Marjorie Benton negotiated the Brown and Watkes checks. Under this theory, as well, the District Court readily could find defendant guilty, even in the absence of a conspiracy charge in the indictment. *United States* v. *Pinkerton*, 151 F.2d 499, 500 (5th Cir. 1945), *aff'd*, 328 U.S. 640,

---

the false statements made by Benton to the agents consistently coincided with the story his sister earlier had provided to the bank, and the trial court was entitled to consider the fact of collaboration between the two to infer both Henry Benton's awareness of the scheme and his participation therein. *United States* v. *Cades*, 495 F.2d 1166 (3d Cir. 1974); *United States* v. *Bowles*, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

reh. denied, 329 U.S. 818 (1946); *Nye & Nissen* v. *United States*, 168 F.2d 846, 853-54 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949). Cf. *United States* v. *Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).* Accordingly, Benton's claim that the evidence

---

* It is clear that even in the absence of a specific conspiracy charge or aiding and abetting charge in an indictment, a defendant may be convicted on such a theory of vicarious liability where the facts, as here, warrant its application. Thus, in *United States* v. *Pinkerton, supra*, 151 F.2d at 500, the Fifth Circuit expressly held:

> "In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses, the jury could weigh all the foregoing circumstances in determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substanive offenses, *and this would be true if there had been no conspiracy count in the indictment.*
> '*Although conspiracy be not charged*, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all.' *Davis* v. *United States*, 5 Cir., 12 F.2d 253, 257." (Emphasis supplied).

See also, *Nye & Nissen* v. *United States, supra*, at 853-54. This Court's recent decision in *United States* v. *Hyatt*, Dkt. No. 77-1294, slip. op. 177 (2d Cir., November 1, 1977), is not to the contrary. In *Hyatt*, the Government attempted on appeal to sustain defendant's conviction on the alternative theories that the proof showed Hyatt to have been either an aider and abettor, or a member of a conspiracy to utter forged checks. This Court noted that while the Government's theory was "superficially appealing" it could not withstand analysis because (i) there had been no instance of uttering—the commission of the actual crime—to support a finding of aiding and abetting; and, (ii) there was no agreement to commit that crime—to support a conspiracy theory—since the agent with whom Hyatt met never intended to utter the checks. In this context, the Court noted that a conspiracy "was neither charged *nor proved* in this case." Slip. op. at 184 (Emphasis added). Here, of course, the proof necessarily showed that Benton agreed to engage in the scheme with his sister before the checks were uttered since he had noted the two stolen checks before they were deposited, and later tried to withdraw the proceeds from the Perez account as part of his role in the conspiracy.

showed no more than that he was an accessory after the fact with earlier full knowledge of the scheme, simply is inapposite. Even under defendant's view, the evidence fully warranted a conclusion by the trial court that Benton had agreed with his sister to engage in the scheme to obtain and negotiate stolen checks, and thereafter to divide the proceeds of their illegal venture. Defendant, therefore, properly was convicted even if his first affirmative act after joining the conspiracy was to try to withdraw proceeds of the checks from the fictitious Perez account.*

---

* In this respect the two Fifth Circuit cases relied on by defendant to support his claim that he was no more than an accessory after the fact, are readily distinguishable on their facts. In *Roberts* v. *United States*, 416 F.2d 1216 (5th Cir. 1969), the evidence showed that the defendant Bookout specifically had eschewed membership in the conspiracy before the counterfeit money was passed. Her sole role in the events at issue in *Roberts* was the destruction of additional counterfeit after the scheme had been detected and arrests effectuated. Thus, Bookout solely was involved in an attempted coverup of the already completed crime—activity which was separate and distinct from the underlying conspiracy. *See, Grunewald* v. *United States*, 353 U.S. 391 (1957); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). Similarly, in *United States* v. *Ferraro*, 414 F.2d 802 (5th Cir. 1969), there simply was no proof that defendant knew about in advance, let alone participated in, the actual embezzlement of bank funds by his girl friend. Thus, there could have been no possible finding that Ferraro was a participant in a scheme with his girl friend at the time that she embezzled the monies from the bank where she was employed. By contrast, here Judge Ward specifically found from the deeply incriminating business card that Benton had knowledge of at least the Brown and Watkes checks prior to the time that they were deposited—information which it was fair to infer Benton could only have learned by viewing the two checks himself. Moreover, the entire chronology of Benton's actions supported the conclusion that, from the start, he knew about the purpose and contents of the fictitious Perez account and readily participated in washing the funds through that account with his sister.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

PATRICIA ANNE WILLIAMS,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1977— 714-059-691

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PATRICIA ANNE WILLIAMS being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of November, 1977, she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Leonard Joy, Esq.
Legal Aid Society
Appellate Section
United States Courthouse
Foley Square
New York, New York

And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Patricia Anne Williams

Sworn to before me this

17th day of November, 1977

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-703450 Qualified in Kings Co.
Commission Expires March 30, 1978